



**THE ATTORNEY GENERAL  
OF TEXAS**

**CRAWFORD C. MARTIN  
ATTORNEY GENERAL**

**AUSTIN, TEXAS 78711**

August 6, 1968.

Hon. Alfred Fitzpatrick  
County Attorney  
Dimmit County  
Carrizo Springs, Texas 78834

Opinion No. M-265

Re: Fence cutting, road  
blocking and related  
questions-applicability  
of Articles 784 and  
1353, Vernon's Penal  
Code.

Dear Mr. Fitzpatrick:

This office is in receipt of your recent request for  
an opinion wherein you state as follows:

"I am requesting your opinion in regard to three  
matters, closely related, dealing in essence with  
the right of a landowner to have access to his  
land. These questions involve a determination  
of the applicability of Article 784 and 1353,  
Texas Penal Code, the factual situations being  
as follows:

"Situation 1: A owns 40 acres of land designated  
'A' on the attached drawing marked Exhibit 1. B  
owns surrounding land designated 'B', the remaining  
land being owned by parties not material to the  
situation. A does not reside on land 'A', but  
has fenced the same and made certain improvements  
on it. A seeks access on an alleged County Road  
laid out by the Commissioners Court in the late  
1800's, but not used as a road for a period in  
excess of twenty years. The alleged County Road  
is marked in red and B's fences in blue. If the  
boundaries of the County Road can be established  
as marked, the fences of B would obstruct the  
County Road.

"Situation 2: This situation involves a ten  
acre tract of land owned by A in a subdivision  
established in the early 1900's, the subdivision

being partially shown by Exhibit 2. The plat of such subdivision shows a 40-foot road as indicated on the Exhibit, by which owners of each tract would have access to an established County Road. However, no development of the subdivision was ever made, the roads themselves not laid out on the ground, and the ten acre tract is inclosed by the fence of B who owns the majority, but not all, of the surrounding land. A does not reside on the land, it is not separately fenced, and no improvements are on it.

"Situation 3: A owns the property marked 'A' on Exhibit 3, the only access to this land from the County Road being through the land of B on the road marked in red. This latter road has never been declared a public road by the Commissioners Court, but it has been used by A and his predecessors in title in excess of a twenty-year period. The road is also maintained by the County. A does not reside on the land except during part of the hunting season, but there are improvements on the same and the land is fenced. B has given notice that he intends to construct a fence across the road used by A in reaching his land.

"In each of the three situations it is necessary to know if A would violate Article 1353 by injuring the fence of B, as well as if B violated or would violate Article 784 by obstructing the road with a fence. If there is a violation on B's part, then the fence would have to be removed and A would thereby have access to his tract of land."

Inasmuch as the provisions of Article 4399, Vernon's Civil Statutes, limit the authority of this office to advising your office in regard to the prosecution and defense of actions wherein the state is interested, this opinion shall be restricted to a discussion of the applicability of Articles 784 and 1353, Vernon's Penal Code, to the stated fact situations. No attempt will be made to set out, itemize, define or otherwise discuss the "right of a landowner to have access to his land" or to his civil remedies incident

thereto.

Article 784 provides as follows:

"Whoever shall wilfully obstruct or injure or cause to be obstructed or injured in any manner whatsoever any public road or highway or any street or alley in any town or city, or any public bridge or causeway, within this State, shall be fined not exceeding two hundred dollars."

That the road be a "public road" and that the obstruction was "wilfully" placed are both necessary elements of the offense which must be found upon sufficient evidence by the trier of fact, and in the case of a jury, upon proper instruction of the Court.

As to "public road," such element in each case must be found from evidence showing that the road was in fact open to, or was in fact being used by the public as such, regardless of the condition of title or the private rights of any party in the land or roadway in question.

Article 784 does not define "public road" but its meaning may otherwise be established, as shown by the holding in O'Sullivan v. Brown, 171 F.2d 199, 201 (1948):

"The Texas legislature did not define a public road or public street in the nonresident motorist statute, but it did define them in other acts having to do with motor fuel taxes and with the regulation of vehicles and of traffic. [Art. 7965b-1; Art. 6701c, §1(g); Art. 6675a-1(m); Art. 6101d, Subd. III, §13(a) and (b)]. Under these definitions, to constitute a public highway or street, the way must be (1) open to public use as a matter of right, (2) subject to State legislative jurisdiction under its police power and not privately owned or controlled, or (3) publicly maintained when any part of it is open to use; while a private road or driveway is a way or place privately owned and used by the owners and those having express or implied permission from the owners, but not by others.

"The distinguishing characteristics relative to

the nature and use of highways is that they be open generally to the public, as a matter of right, regardless of their ownership. (39 C.J.S., Highways, §1, pages 915, 919 )"

In Nichols v. State, 120 Tex.Crim 219, 49 S.W.2d 783, 784 (1932), the court said:

"The question thus arises as to what is a public highway or road in the sense that term is used in Article 802, P.C. The object of said statute is to protect the general public, while using ways which are open to the public from dangers incident to the operation thereon of automobiles.

". . . We further believe that the allegations in the second count were sufficient. Also, that by oral testimony of persons reasonably familiar with such use, it may be shown that such street, road, or highway is public, that is, one used or open for use and traffic by the public. Questions as to the time or manner of dedication, title to the soil, place of location, as within a city, town, or in the county, or questions of private rights and privileges, become ordinarily immaterial upon a trial when the indictment charges that the place of such violation, in a case like this is upon a public road or highway, and when the testimony of witnesses be without contradiction that such road is open or used for traffic by the public generally."

As to the remaining element of "wilfully," it should be pointed out that the cases hold, and any instruction should import, that intent is a constituent element of this offense, and it must appear that the obstruction was wilful on the part of the accused. Such intent is not to be presumed from the act of obstruction; but it must be proved as a fact as such fact is proved in other offenses where it is an element of the offense. Brinkoeter v. State, 16 Tex.Crim. 72 (1884); Shubert v. State, 16 Tex.Crim. 645 (1884); Jenkins v. State, 124 Tex.Crim. 92, 60 S.W.2d 1040 (1933).

The three fact situations presented require separate

consideration as to the element of "public road," to-wit:

Situation 1. The road was laid out by the Commissioners Court in the late 1800's, presumably was opened, used and maintained as such for some time, but has not been used as a road for a period of time in excess of twenty years.

Under certain circumstances the public nature of such a road may be terminated by discontinuance on the part of the Commissioners Court, adverse possession on the part of the property owner, or by common law abandonment. These will be discussed separately.

a. Discontinuance by Commissioners Court.

If this road was laid out in accordance with the provisions of Article 6703, Vernon's Civil Statutes, et seq., the right of the public in such road may be discontinued only by the Commissioners Court following the procedure for such discontinuance as set out in Article 6703, et seq., Porter v. Johnson, 140 S.W. 469 (Tex.Civ.App. 1911, no writ).

Provided, however, that Article 5526a, Vernon's Civil Statutes, provides that if the Commissioners Court, though not strictly following such procedures, had passed an order closing and abandoning, or attempting to close and abandon such public road, the right of the public therein would be cut off after two years inasmuch as such statute purports to vest limitation title in the landowner in possession.

If, however, the road had not been laid out in accordance with the provisions of Article 6703, its discontinuance might be effected by means other than those prescribed in Articles 6703, et seq. Simons v. Galveston H. & S.A. Ry. Co., 57 S.W.2d 199 (Tex.Civ.App. 1933, err. dismd.). It would therefore, appear that in cases where the road had not been laid out in accordance with Article 6703, et seq., a discontinuance might be shown by acts short of Commissioners Court compliance with Article 6703, et seq., or without such an order as is described in Article 5526a.

The facts stated in Situation 1 do not appear to indicate that a discontinuance was effected in any of the above described ways and it is doubtful that the public nature of the road could be found to have been terminated by discon-

tinuance on the part of the Commissioners Court.

b. Adverse possession by land owner.

As a general rule public easements are not subject to the bar of the statute of limitations. Eidelbach v. Davis, 99 S.W.2d 1067, 1073 (Tex.Civ.App. 1936, error dismd.). In fact, Article 5517, Vernon's Civil Statutes, in excluding county roads from the applicability of the limitation statutes provides as follows:

"The right of the State, all counties, incorporated cities and all school districts shall not be barred by any of the provisions of this Title, nor shall any person ever acquire, by occupancy or adverse possession, any right or title to any portion of any road, street, alley, sidewalk, or grounds which belong to any town, city, or county, or which have been donated or dedicated for public use to any such town, city, or county by the owner thereof, or which have been laid out or dedicated in any manner to public use in any town, city or county in this State."

The provisions of Article 5517, supra, prohibit the taking of title to old roads by adverse possession. Maples v. Henderson County, 259 S.W.2d 264, 268 (Tex.Civ.App. 1953, error ref., n.r.e.). However, in 1955, Article 6703a, Vernon's Civil Statutes, was enacted which provides:

"Whenever the use of a county road has become so infrequent that the adjoining land owner or owners have enclosed said road with a fence and said road has been continuously under fence for a period of twenty (20) years or more, the public shall have no further easement or right to use said road unless and until said road is re-established in the same manner as required for the establishment of a new road; this Act shall not apply to roads to a Cemetery or Cemeteries; provided, however, that this Act shall not apply to access roads reasonably necessary to reach adjoining land."

It is a fact question as to whether this road is an "access road reasonably necessary to reach adjoining land," and if so, Article 6703a not only would be ineffective in

cutting off the private right of an adjoining land owner but by its own provisions it would not cut off the public rights in such road in that its provisions simply do not apply in such situation.

Further problem is presented by the question of whether Article 6703a is prospective or retrospective in nature. If determined to be prospective, the twenty year limitation period would not begin to run before its enactment in 1955 and in no case would any rights have yet ripened thereunder. Thus, if the road had been properly laid out in accordance with Article 6707 et seq., as a matter of law, the public nature of such road has not been lost by adverse possession under this statute. If the statute were determined to be retrospective in nature it would be a question for the trier of fact whether the use had become so infrequent that the adjoining land owner or owners had enclosed said road with a fence and said road had been continuously under fence for a period of twenty years or more.

c. Common law abandonment.

It is recognized that in limited situations the public nature of a road may be lost by common law abandonment, and it is believed that 39 C.J.S., Highways, Section 130, pages 1065, 1066 contain as concise a statement as can be found on the point, to-wit:

"While 'once a highway always a highway' is an ancient maxim of the common law, nevertheless as far as the public is concerned, the right to a public highway may be lost by abandonment, subject only to the limitation that the abandonment shall not injure vested rights. To effect an abandonment there must be an intention to abandon.

"It is presumed that a highway, once shown to exist, continues to exist. Abandonment is a fact which must be proved and the burden is on the one who asserts abandonment to prove it by clear and satisfactory evidence."

Texas recognizes such doctrine, as is shown by the following excerpt from the case of Maples v. Henderson Co., supra, to-wit:

". . . We agree with appellants that a common-law abandonment is made up of two elements: (1) Acts of relinquishment, and (2) the intention to abandon. Both elements must be shown by the parties asserting the abandonment, though intention may be inferred from the conduct of the parties. . . . Neither do we believe that the failure of the County to grade the road in recent years or otherwise maintain it, establishes an abandonment as a matter of law."

It would, therefore, appear that even though the road had been laid out in accordance with Article 6703 et seq., and had not been discontinued by action of the Commissioners Court, the defendant might show facts upon which could be found a common law abandonment and therefore defeat a finding of the existence of a public road.

Situation 2. This involves a forty foot roadway dedicated to public use by plat, but no development has been made of the subdivision and the roads were never "laid out" on the ground.

"It is well settled that, though a particular plat undertakes to dedicate streets and roads, such does not make them public roads, with consequent obligation on the Commissioners Court, as the dedication is a mere offer; McQuillin on Municipal Corporations, Second Edition, Vol. 4, sec. 1700; 16 Am.Jur. p. 374; 66 A.L.R. 332; McLennan County v. Taylor, Tex.Civ.App., 96 S.W.2d 997." Commissioners Court v. Frank Jester Development Company, 199 S.W. 2d 1004, 1007 (Tex.Civ.App. 1947, error ref., n.r.e.).

Although the above case dealt primarily with the obligation of the county in regard to the maintenance of the road, in Rankin v. State, 8 S.W. 932 (1888), the Texas Court of Appeals, in a criminal prosecution under the forerunner of Article 784, Texas Penal Code, spoke directly on this point by holding as follows:

"By the first count in the information the defendant is charged with unlawfully and willfully obstructing and injuring, and causing to be obstructed and injured, a public road. This count is not sustained by the evidence; the fact being



that the obstruction complained of, a fence, was on defendant's land at the time said road was established. The said road was never opened after it was established. It could not be obstructed, within the meaning of Article 405 of the Penal Code, until it had been opened."

Rankin, supra, involved a road laid out apparently by the Commissioners Court in accordance with the provisions of 6703 et seq., and involved a pre-existing fence, yet it is important to note that the Court directly held that a road could not be obstructed until it had been opened. Although the road in Situation 2 is one that was laid out by "dedication" of the property owner, the facts would not appear to support a finding that it had ever been opened to the public; and until this was done, the evidence could not support a finding that it was a "public road."

Situation 3. This involves a road that has never been declared to be a public road by the Commissioners Court, but the road is maintained by the county. According to the plat you submitted the road crosses the land of "B" and dead-ends at the property of "A". The test of whether a road is in fact public was discussed in Bradford v. Moseley, 223 S.W. 171, 173 (1920), by the Texas Commission of Appeals as follows:

"Whether a road is public depends in a measure on the particular facts, but it does not depend on its length, its terminus, nor the number of people who use it; it is a public road if there is a general right to use it for travel even if it ends in a cul-de-sac."

Proof may be adduced of the fact that the road is public in a number of ways, as shown in the holding of the courts in Wood v. State, 45 S.W.2d 599, 600 (Tex.Crim. 1931):

"It is well settled under the decisions of this court that a road may be shown to be a public road by other evidence than the production of the order of the commissioners' court establishing it as such. The undisputed evidence offered by the state showed that between 3 or 4 years prior to the 4th day of July, 1929, Richards Park was donated as a fair ground, and that this road was opened up through the park,

and that since that time it had been open to and used by the general public as a public road, and that for the same length of time the county commissioners' court, acting through the commissioner in whose precinct the road lay, had recognized it as one of the public roads of the county, and had regularly worked the same as a public road for the county with county employees, teams, and machinery, and had been so doing for more than 3 years. This was sufficient evidence to establish it as a public road prima facie under the decisions of this court. See Michel v. State, 17 Tex.App. 108; Berry v. State, 12 Tex.App. 249; Race v. State, 43 Tex.Cr.R. 438, 66 SW 560; Jolly v. State, 19 Tex.App. 76; Dyerle v. State (Tex.Cr.App.) 68 S.W. 174; Ward v. State, 42 Tex.Cr.R. 435, 60 S.W. 757; Johnson v. State (Tex.Cr.App.) 31 S.W. 2d 1084."

In Johnson v. State, 31 S.W. 2d 1084, 1086 (1930), a Commission of Appeals case with opinion approved by the Court of Criminal Appeals, the court held:

"The state was unable to show from the records that the road upon which appellant was alleged to have driven the automobile had ever been established as a public road by order of the commissioners' court, in compliance with the statutory requirements, and the state then resorted to proof of long usage of said road by the public, and recognition of it as a public road by the commissioners' court in working it in order to establish the public character of the road. All of such testimony was objected to by appellant on the ground that no 'proper predicate had been laid.' We are unable to perceive what further predicate was necessary than to show an absence of court orders establishing the road in compliance with the statute to render admissible the evidence objected to. The evidence shows conclusively that the road in question had been used by the general public as a public road for more than thirty years. Road hands under the old road laws had worked it under the supervision of road overseers; and in recent years the commissioners' court, through the county commissioners or road supervisors, had graded and worked the road. We do not undertake to set out the evidence in detail,

but it is ample to establish that the road in question was a public road under many authorities . . ."

It is thus apparent that a road as that above described, if open to, used, and recognized by the public as such, may be shown to be a public road within the meaning of Article 784, and if so found by the trier of facts upon sufficient evidence of such use, maintenance, acceptance and freedom of passage, should sustain a conviction.

Article 1353, Vernon's Penal Code, provides as follows:

"Any person who shall wilfully and wantonly or with intent to injure the owner cut, injure or destroy any fence or part of a fence (unless such fence is the property of the person so cutting or destroying the same) shall be confined in the penitentiary not less than one or more than five years. A fence within the meaning hereof is any structure of wood, wire, or of both, or of any other material intended to prevent the passage of cattle, horses, mules, asses, sheep, goats or hogs, provided however, that it shall constitute no offense for any person owning or residing upon land inclosed by the land<sup>1</sup> of another who refuses permission to such person residing within such inclosure free egress or ingress to their said land for said person to open a passage way through said inclosure."

Here, again, "wilfully" and "wantonly or with intent to injure the owner" are both requisite elements of the offense and must be found to exist by the trier of facts. However, your inquiry is directed more to the applicability of the exclusion from coverage of "any person owning or residing upon land inclosed by the land (fence) of another who refuses permission of such person residing within such inclosure free egress or ingress to their said land for said person to open a passage through said inclosure."

---

<sup>1</sup> So in enrolled Bill. Probably should read "fence."

It is the opinion of this office that it would be a violation of Article 1353 for anyone to cut such fences if they were not the owner of such fences, except in situations where free egress and ingress have been denied to a person residing within such enclosure and the fence is cut by the owner of the property enclosed or by such resident thereon.

Where there is no resident involved, the owner of such enclosed land does not have the need of immediate ingress and egress and must avail himself of remedies other than that of self-help of opening a way. In none of the three fact situations do you show anyone to be residing upon such premises; therefore, the cutting of such fence would subject the offender to prosecution under such Article, all other elements of the offense being present.

#### S U M M A R Y

(1) A road laid out by the Commissioners Court in the late 1800's, but not used as a public road for more than 20 years, remains a "public road" as that term is used in Article 784, Vernon's Penal Code, unless rights of public were cut off by (a) discontinuance by Commissioners Court, (b) adverse possession by land owner, or (c) by common law abandonment, each of which are fact questions to be determined by the trier of facts.

(2) The mere fact that an area is shown on a recorded plat as a road dedicated to public use, but which has never been opened to the public, would not support a finding that such area was a "public road," as such term is used in Article 784.

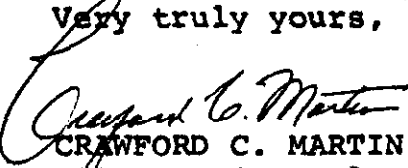
(3) Road maintained by county as a public road but which has never been laid out or dedicated to public use by official action of the Commissioners Court may none-the-less be found by the trier of facts to be a "public road," as that term is used in Article 784.

(4) In each of the three fact situations referred to above, it would be a violation of Article 1353, Vernon's Penal Code, for anyone

to cut such fences if they were not the owner of such fences, except in situations where free egress and ingress has been denied to a person residing within an enclosure and the fence is cut by the owner of the property enclosed or by the resident thereon.

(5) For there to be a violation of either Article 784 or 1353, the acts of the offending party must be found by the trier of facts to have been done wilfully; and such intent is not to be presumed from the act done, but it must be proved as a fact.

Very truly yours,

  
CRAWFORD C. MARTIN  
Attorney General of Texas

Prepared by Howard M. Fender  
and Harold Kennedy  
Assistant Attorneys General

APPROVED:  
OPINION COMMITTEE

Hawthorne Phillips, Chairman  
Kerns Taylor, Co-Chairman  
Ronald Luna  
Fisher Tyler  
Brandon B. Bickett  
Arthur Sandlin

A. J. Carubbi, Jr.  
Executive Assistant Attorney General